No. 4091

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,
*Appellant,*

vs.

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. BUCKMAN, bankrupt, and H. M. WRIGHT et al.,
*Appellees,*

and

J. J. RAUER,
*Appellant,*

vs.

GEORGE H. HATFIELD et al.,
*Appellees.*

## APPELLANT'S REPLY BRIEF.

H. M. ANTHONY,
J. B. ZIMDARS,
WM. GRANT,
*Attorneys for Appellant.*

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## APPELLANT'S REPLY BRIEF.

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The first part of appellees' brief is directed to the question of the right of appellant Rauer to have reviewed the decree of September 11, 1916, and to that question this argument will be addressed, before taking up the merits of the appeal.

In our opening brief, pages 17 et seq., we urged that the decree of September 11, 1916, should not be construed as determining that Rauer was a con-

spirator with Buckman in the formation of the corporation, Sunset Construction Company, for the purpose of defrauding the creditors of Buckman, and we think our reasons there advanced are quite convincing; but assuming we are wrong in our contention, then we urge that a decree so determining is not supported either by the pleadings or by the evidence, and should be set aside on appeal.

The Master's report which became in effect the final judgment from which the appeal has been taken, proceeds upon that which we say is the erroneous construction of the decree. In the report the Master says:

> "Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the Company after Buckman's bankruptcy as a separate entity, not affected by his bankruptcy. These, however, are matters that concern the correctness of the interlocutory decree only, and so far as Rauer is concerned, I shall hereafter embody a recommendation that he be allowed to prove his claim herein." (Transcript, page 63.)

Further in the report the Master says:

> "It must be remembered that Rauer dealt with the Sunset Construction Company after Buckman's bankruptcy, and undoubtedly on the theory that he was safe in so doing since the Company had not been declared a bankrupt." (Transcript, page 71.)

Therefore the question as to whether the decree of September 16th was final and appealable is a matter of consequence, and as counsel for appellee

has devoted a large portion of his brief to this question, we may be pardoned for treating the matter at some length.

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**THE APPEAL OF SEPTEMBER 11, 1916, IS NOT A FINAL DECREE AND CAN BE REVIEWED ONLY ON THE APPEAL FROM THE FINAL JUDGMENT, AND THERE IS NO QUESTION THAT THE APPEAL FROM THE FINAL JUDGMENT WAS TAKEN WITHIN TIME AND IS PROPERLY BEFORE THIS COURT.**

Section 128 of the Judicial Code (see Federal Stat. Ann., 2nd Edition, Volume 5, page 607) provides:

> "Circuit Courts of Appeal shall exercise voluntary jurisdiction to review by appeal or writ of error *final* decisions in the district courts. * * *"

If the decree of September 11, 1916, is not final, an appeal therefrom would not lie, and it can be reviewed only through an appeal from a final judgment in the courts.

The question as to what constitutes a final decree has been the subject of much discussion. In the notes to the above citation, the subject is treated at great length, and many cases are cited. We refer specially to pages 611, 612 and 613. The rule established by the decision is this:

> "Where a decree is made fixing the liability and rights of the parties, and which decree refers the case to a Master for a judicial purpose, such for instance as a statement of account upon which a further decree is to be entered, the appeal is not final."

In the instant case, not only does the decree order an accounting, but in terms it directs the Master to report his accounting to the court that further action may be taken thereon. (Transcript, page 16); and in the complaint itself, the prayer asks:

> "That an accounting be had from said defendants of the assets and profits of said corporation since the month of January, 1914." (Transcript, page 7.)

It is true that if a decree is entered directing something to be done, which is simply in execution of the decree, the decree may be regarded as final; but where the act to be done is judicial in its character, and is not designed to be final but is subject to confirmation by the court directing the act to be done, the decree is but interlocutory and is not reviewable by direct appeal.

In the case of

> Cal. National Bank v. Stateler, 171 U. S., at page 447,

it is said, quoting from the opinion:

> "Motion is made to dismiss this writ of error upon the ground that no Federal question is involved in this case.
>
> Without, however, expressing an opinion upon this,—we think the case will have to be dismissed on the ground that the order appealed from is not a final order within the decisions of this court. * * *
>
> The settled rule is that if a Superior Court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon

which a further decree is to be entered, the decree is not final. Craighead v. Wilson, 18 How. 199 (15:332); Beebe v. Russell, 19 How. 283 (15:668); Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91 (33:275); Lodge v. Twell, 135 U. S. 232 (34:153); McGourkey v. Toledo & Ohio C. Railway Co., 146 U. S. 536 (36:1079); Union Mutual Life Ins. Co. v. Kirchoff, 160 U. S. 374 (4):461); Hollander v. Fechheimer, 162 U. S. 326 (40:985).

The writ of error is therefore dismissed."

See

Simkins Fed. Suit in Equity, page 636;

Keystone Iron Co. v. Martin, 132 U. S. p. 91, and Rose's Annotations thereto;

s. c. 5th Ann. Case 177.

In the notes to 5th Ann. Case 177, it is said while there is some diversity among the courts of several states as to what is an interlocutory decree, the United States Courts hold that where an accounting is to follow as a judicial matter, the judgment is not final.

In the very late case of

Clement v. Duncan, 39 Cal. App. Dec., page 13,

it is said:

"An interlocutory decree in an action for a dissolution of a partnership and for an accounting based upon findings which determine none of the questions at issue except the fact of partnership and the existence of mutual and undetermined claims and demands and upon a conclusion of law which declares no more than that an accounting is necessary, is not a

> full and final determination of all the issues raised by the pleadings, and a dismissal of an appeal from such a decree does not preclude its review on appeal from the final judgment."

See

Rossi v. Caire, 64 Cal. Dec. 237.

In the annotations to Section 128 of the Judicial Code found in the 5th Federal Stat. Ann., page 612, under the subdivision 4, "References and Accounting", there will be found a quite full discussion of this question as to what is a final judgment, and a lengthy list of cases from U. S. Supreme Court is cited. We ask the court to read that note, which to our mind is exhaustive of this question.

The motion of appellee to dismiss the appeal is based on two grounds: First, that no appeal was taken within six months from the decree of September 11, 1916, and secondly, that some of the defendants named in the original bill were not served with the appeal process.

There is no question, of course, that an appeal was properly taken from the final decree within due time.

In answer to the motion to dismiss because some of the defendants were not served with due process, attention is called to the facts embodied in the affidavit on file herein that the defendants not served with process had died long prior to the entry of the judgment; that no representatives of their estates have been substituted, and further, the judgment of

the lower court was in favor of the defendants who were deceased, and no appeal was taken therefrom by any of the parties to this present appeal. The appellant Rauer simply appeals from that part of the judgment which decrees he must pay a certain sum of money to the trustee in bankruptcy. He does not appeal from that part of the judgment dismissing the defendants, who have died, from the action; and, as before stated, the trustee in bankruptcy has taken no appeal at all from the judgment. Furthermore, it may be suggested that a judgment taken against a dead man, without representation of his estate, is void; and if the appeal were taken after a valid judgment, and a respondent to the appeal had died after the appeal was taken, the dismissal of the appeal would not be the proper practice, but under the Compiled Statutes of 1916, page 1308, notice would have to be given to substitute a representative of the estate.

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REPLY ARGUMENTS ADDRESSED TO MERITS OF THE CASE.

Much of appellee's brief, and much of the oral argument was directed to items and amounts appearing in the record. The report of the Master finds that on February 19, 1915, the date that Buckman voluntarily filed his petition in bankruptcy, the Sunset Construction Company was indebted to Rauer in the sum of $18,746.22 (Trans. p. 77); and later is shown by the record that the Sunset Construction Company became indebted to Rauer

in the additional sum of $18,561.54, thus making a total of $37,307.76. No appeal was taken by the trustee from this report, and therefore so far as the trustee is concerned, the figures found by the Master must be accepted as correct. Certainly Rauer was not putting his good money into the Sunset Construction Company to keep it afloat and going to that extent to defraud Buckman's creditors. It will be remembered that Rauer is the only creditor of the Sunset Construction Company and that as far as the record shows the only creditors of Buckman were persons who had claims against him prior to the formation of either of the two corporations, Sunset Construction Company, excepting only the creditor the woman who obtained a judgment against him for $15,000.00 for breach of promise of marriage, and which judgment led to Buckman filing his voluntary petition in bankruptcy.

The record shows that Buckman had no assets of any kind whatsoever at the time he filed his petition in bankruptcy, and as recited by the Master in his petition for compensation, unless judgment was obtained against Rauer in the instant case, there would be no funds whatever belonging to the bankrupt estate.

The accounts of the Sunset Construction Company were most carefully examined. Nowhere is there any suggestion that Rauer had any dealings with the Sunset Construction Company, excepting that of a man lending money thereto, and these transactions extended over a period of many years.

Complaint is made by the appellees that Rauer drove a hard bargin with the Sunset Construction Company, and the terms upon which he lent money. While the interest rate charged by Rauer was high, yet as found by the Master, the enterprise in which the Sunset Construction Company was engaged, and without financial responsibility called for a high rate of interest.

If it were a fact that Rauer did drive a hard bargain with the Sunset Construction Company in his financial dealings with them, such conduct is quite out of line with the thought that Rauer and Buckman were acting in concert for the advancement of especially Buckman's interest.

Fraud is never presumed, and no transaction is shown by this record indicative in any wise of a purpose on the part of Rauer to defraud the creditors of Buckman. There is no evidence to show that Rauer ever knew that Buckman had a creditor, much less that Rauer knew that the Sunset Construction Company was a cloak whereby Buckman could defeat his creditors.

Comment is made by counsel that Rauer referred to Buckman as the "whole shooting match". Buckman was the general manager of the corporation. He had full power from the board of directors to enter into the contracts with persons doing business with the corporation, and unquestionably he was the active man representing the corporation, and in the language of the street he was "the whole

shooting match". That does not mean that Rauer did not view the Sunset Construction Company as a corporation, simply because Buckman was the "whole shooting match" in connection with the carrying on of its affairs. The Sunset Construction Company functioned completely as a corporation. All the accounts and transactions were with the Sunset Construction Company; not only the transactions that Rauer had with the Sunset Construction Company, but all transactions of all parties shown by the books, were with the Sunset Construction Company.

If it were a fact that Buckman formed this corporation for the purpose of defeating his creditors, this would not affect Rauer's right to do business with the corporation, provided he was not a party to a conspiracy in the formation of the corporation, or engaged in the scheme to defraud Buckman's creditors. The complaint in this action does not even suggest that Rauer had anything to do with the affairs of the corporation, and his connection with Buckman, as shown by the complaint is that of a person who acquired the shares of stock some three years after the formation of the corporation.

The Master who heard the testimony in this case certainly did not think that Rauer was a party to any fraud. This is conclusively established by the fact that the Master states that in his opinion a hardship is worked upon Rauer by the construction that he, the Master, places upon the decree, and that Rauer believed he could safely transact

business with the Sunset Construction Company not affected by the fact that Buckman personally had filed a petition in bankruptcy.

Certainly it will not be suggested that if the Master believed Rauer to have been guilty of entering into a conspiracy with Buckman to defraud Buckman's creditors, that the Master would go out of his way to say that he would embody a recommendation that Rauer be allowed to prove his claim against the bankrupt estate. Not only is there no evidence to warrant a conclusion that Rauer was a party to any conspiracy, but the contrary is to our mind most conclusively established by the facts that Rauer is the only creditor of the Sunset Construction Company, and that to the amount of some $37,307.76, and that the Master reports that his construction of the decree works such a hardship upon Rauer that he will endeavor to get relief for Rauer by joining in a request that he be allowed to prove the amount of his claim against the bankrupt's estate. This measure we can hardly assume the Master would have suggested if Rauer's losses had been the result of a fraudulent conspiracy in which Rauer actively participated for the purpose of defrauding others.

The final decree in this case is in favor of Buckman for his costs. (See Transcript page 206.) How could this be reconciled with the theory that even Buckman was a party to any fraudulent conspiracy? It will be remembered that the petition in bankruptcy was a voluntary petition, and was

brought about by the procurement of the judgment against Buckman by a woman for breach of promise of marriage.

The corporations were formed in the years 1910 and 1911; the judgment for breach of promise of marriage was obtained in 1914.

On page 32 and 33, et seq. of Appellant's Opening Brief, it is urged that the shares of stock owned by Buckman in the Sunset Construction Company were pledged to Rauer. Concerning this transaction or pledge, and the validity thereof, no question whatever can be made, excepting only the general objection that the whole corporation scheme was a measure adopted by Buckman and Rauer to defraud Buckman's creditors. Buckman, however, did pledge his shares of stock to Rauer for money advanced by Rauer, to secure the payment of a $20,000.00 note. (Transcript p. 233.) Rauer testified that at the pledgee sale he sold these shares, and it appears that Meadows subsequently became the owner thereof, but whether the pledgee sale was effective or not, the pledge undoubtedly existed, and the rights of the trustee as successor in interest of the pledgor, is subject to the rights of either Rauer as pledgee, or Meadows, as owner, and neither of these rights is recognized in the accounting.

The appellee on pages 33 and 34 of his brief, urges that Rauer is not in a position to make this point because he testified that he sold the property

at the pledgee sale, and it is also claimed by the appellee that Meadows has not appealed from the judgment declaring that the trustee is the owner of these shares, and therefore the judgment concludes the question that the trustee is the owner of the shares.

The interlocutory order was not a final order, and Meadows could not appeal therefrom. It appears from the affidavit filed at the time of the argument that Meadows died on the 9th day of August, 1920, in the City and County of San Francisco, and there has been no administration upon his estate, and no one has been substituted in this litigation to represent the Meadows interest. The final judgment in this case was entered on November 6, 1922. Therefore the judgment is void as against the Meadows interest. Rauer can defend against the claim of the trustees by showing a title outstanding in a third person. The plaintiff must recover upon the strength of his own title. The record in this case establishes beyond question that these shares of stock are either held by Rauer as pledgee, or the shares of stock belong to the estate of Meadows, and in no event is the trustee as the successor of the pledgor entitled to any accounting unless the rights of Rauer as pledgee, or the rights of the estate of Meadows, as an owner, are given effect.

Counsel for appellees in his oral argument stated that the appellant had not conformed to the rules, in that in his brief references to the Transcript

were largely omitted. This is not the fact, as the brief is full of references to the Transcript, and counsel for appellant has been in every way fair to appellee and his counsel.

This, however, is not the case with counsel for appellee. The brief they filed is in our estimation unfair in many of the statements of the facts. They have quoted and addressed themselves to single sentences and entirely omitted the context which explains those sentences in an entirely different way.

Appellant here reiterates the statements made several times in his brief that there is not a bit of evidence anywhere in the record that shows any fraud on the part of J. J. Rauer. Counsel say (page 4) that the record fairly teems with testimony on the subject of Buckman's ownership of the corporation. We say the record is full of evidence that the corporation was a functioning corporation, having meetings of its directors, passing resolutions, etc. (Transcript pp. 227 (bottom) 299, 300, 305, 306) and the Master says undoubtedly it acted as a corporation (Transcript p. 304), and that Rauer dealt with it as such (Transcript p. 63). That it adopted a resolution giving A. E. Buckman authority to do business for it, and that Buckman showed this authority to J. J. Rauer, (Transcript p. 303) and that upon that Mr. Rauer founded his dealings with the corporation through Buckman; and further that Rauer had absolutely nothing to do with the internal affairs of the corporation (Tran-

script pages 299-300); that Rauer knew nothing of its internal affairs and never heard what salary Buckman was getting till he heard it in the Bankruptcy Court. (Transcript p. 238.)

Suppose for the sake of argument, the Sunset Construction Company was Buckman, nevertheless since Buckman represented it as the Sunset Construction Company, and Rauer did business with it upon that understanding, Buckman would be foreclosed from saying otherwise, and Buckman's trustee stands in no different position than Buckman. The Master makes the statement (Transcript p. 304) that "*undoubtedly it* (the Sunset Construction Co.) acted as a corporation", see also p. 63.

Counsel say Buckman drew money from the Sunset Construction Company as he desired it, including personal living expenses (page 5 of brief), citing Transcript folios 210-211. We ask the court to read all of these pages of the transcript, and also page 305 of the transcript. It will be seen therefrom that Buckman apparently did not draw his salary in a lump sum every month but drew upon it as he needed it for his personal expenses. There is no evidence that Rauer had any knowledge of their affairs, much less that Rauer profited or schemed to bring it about. This is an every day occurrence, and it does not in any way establish that Buckman was the owner of the company, much less that Rauer knew it, and it does not prejudice Rauer's position in dealing with it as such. Buckman testi-

fies that none of the moneys advanced by Rauer were advanced to him personally. (Transcript p. 230.)

Counsel say, (page 7 of brief) that Rauer took duplicate notes and securities; that he took one note from the corporation and took another note from Buckman covering the same indebtedness, and quote Rauer as saying when asked why he took this note of Buckman's, that there was really no reason for it as Buckman was really the whole shooting-match. As a matter of fact, when Rauer so testified some years after the occurrence the legal reason for his taking the note of Buckman was not uppermost in his mind, and that reason was this: Having advanced some $20,000 to the company, the assets of which never were very strong, he wanted to get all the security he could, and demanded a pledge of the stock from Buckman. In order to make this pledge a proper one, he took Buckman's individual note and Buckman pledged his individual stock as security for the payment of his individual note. That this amount represented the same indebtedness appears from both the Sunset Construction Company's books and from Rauer's books; and always appeared therein, could always have been ascertained to have been so by anybody who desired to inquire. There was no concealment of any assets nor was there any concealment of any facts, and where inquiry was made concerning these matters these facts were unhesitatingly stated both by the Sunset Construction Company and by Rauer.

Counsel state in their arguments that it was not until the examination before the Referee that these matters developed, that Rauer did not testify to them in the hearing in the District Court. We reply, that the hearing in the District Court was confined to one subject, and that was: Who was the owner of the stock that was pledged to Rauer? And testimony upon these other matters had no place in that hearing .

Rauer collected interest upon only one indebtedness, and not upon any duplicate or triplicate indebtednesses. He collected it at 1½% a month for a while, and then at 2% a month, but most of this interest he did not collect, but today holds the checks of the Sunset Construction Company representing this unpaid interest.

Rauer's accounts and the admitted facts in evidence show that he advanced to the Sunset Construction Company during the time that he was loaning it money, altogether some $105,000 before March, 1915, and thereafter some $20,000 more. Outside of the $20,000 first advanced to the Sunset Construction Company, most of this was borrowed by Rauer for the construction Company from a money lender named Judah Boas, who charged 1½% per month for the use of that money. Rauer stood good for this money and received only ½% as his share for the risk of standing good for all this principal and all this

interest to Judah Boas (see Rauer's and Buckman's testimony, Transcript pages 301-2-5).

Fillmore Buckman, the secretary and bookkeeper of the Sunset Construction Company testifies that his accounts and Rauer's accounts, always tallied approximately. (Transcript page 299.)

Counsel make a great ado about what they claim Rauer's concealment of payments to him, saying that some $23,000 were paid to him of which his books show no account. (Brief page 12.) The reason why these payments did not show in that account was this, and it is fully explained in the testimony: that shortly after the $20,000 note was taken by Rauer, he ceased keeping books of the amounts paid by him, and the amounts loaned by him to the Sunset Construction Company, and the amounts received by him from the Sunset Construction Company, but simply took checks. That is when he advanced money for them they would give him their check, and when he would be paid by them, or on any accounts assigned to him, he would return to the Sunset Construction Company checks that he held in the amount of such money received, and that because he happened to have no regular bookkeeper at that time that is the only account he kept. This matter was most fully gone into on the trial, and counsel for appellee are not putting forth their contention in good faith.

In the record before this court the testimony is very much abbreviated, but there is sufficient to show that these are the facts and references to

transcript pages 177, 295, 298 and 299 will show this. This is also further substantiated by the list of unpaid checks still held by Rauer, on pages 281-282.

The claim of counsel (page 8 of brief) that the notes held by Rauer in December, 1913, showed an indebtedness of $70,000.00, instead of an actual indebtedness of $20,000.00 and that this is evidence of fraud is entirely unsubstantiated by the testimony, for there was never any contention by anybody that the indebtedness was any more than it actually was, and Fillmore Buckman testifies that the Sunset Company's books never showed any greater indebtedness than the actual indebtedness, and that Rauer's accounts always tallied with theirs. (See Transcript page 299.) The duplicate notes were taken simply, as heretofore shown, because different kinds of securities were taken for the balance; and none of these securities were anywhere near sufficient to secure the claim of Rauer. What possible reason could there be for Rauer claiming any greater amount of indebtedness than there was owing to him, when there were no assets anywhere near the amount that was actually coming to him.

Every one of these instances which counsel cite as glaring evidence of Rauer's attempt to deceive is clearly explained by the testimony and shows that Rauer was perfectly innocent of any fraud throughout, and this is conclusively found by the Master himself when he says that Rauer dealt with

the company in the honest belief that he had a right to deal with it. (p. 63 Transcript and 37 and 38.) If it had been designed either by Buckman, or by Rauer to conceal the actual character and extent of the transactions between them, certainly they would have adopted a careful and apparently orderly plan, whereas their dealings showed that they were carried on without any co-ordination or attempt at conformity.

Addressing ourselves to the item of the collection from the Federal Construction Company, counsel say, (page 36 of brief), that the Master gives two reasons for allowing one-half of this collection as a charge against Rauer. It is true in his tentative report he did suggest another reason, but this reason was not adopted in the final report that he filed, and in the final report, pages 73-74 of Transcript, he only gives one reason for his allowance, and that reason we attack.

As to the other reason that this was a contract made before bankruptcy, and although nothing had been done on the contract up to the bankruptcy, and it was wholly performed after bankruptcy by Buckman and by Rauer (Transcript p. 352), without any interference by the trustee, and not until a year afterwards was any claim made by the trustee that this was an asset of the bankrupt. It seems to us that the Master was perfectly correct in abandoning such a contention.

CHATTEL MORTGAGE.

Counsel (page 38 of brief) say that our statement that Rauer had possession of the equipment at all times after bankruptcy is not substantiated by the evidence. They say that in fact he did not get possession until immediately before the decree of the Superior Court was rendered. This is not true. The fact is the Master has charged Rauer with rental of this equipment for periods long antedating that time, and the direct testimony is that Rauer took charge of the equipment on March 20, 1915, which was one month after the bankruptcy. (Transcript page 364.)

Neither was this possession of Rauer colorable, as counsel seek to make it appear by referring to an agreement between Buckman and Rauer with reference to a sale for $2500.00. This agreement and sale to Buckman was only of three sand machines, and there was no agreement with reference to any other part of the equipment. (See Transcript pages 364-370.)

Counsel state the contract with the Federal Construction Company was completed January, 1916, and that this was long before the time when Rauer took possession of the equipment under the chattel mortgage. This is another one of counsel's misstatements of facts.

Counsel say that Rauer did not give Buckman credit upon the mortgage indebtedness, but upon the general running account (p. 39 of brief). The

general running account included the mortgage indebtedness, and if it was not, that can be done at any time since Rauer has a right to do this.

Counsel say on page 39 of brief that the Master treats the San Bruno contract as if it was partly made to cover Buckman's services, but say that the testimony shows that the services rendered by Buckman were of little or no service, and quote some testimony of S. B. Doyle and J. A. Dowling, citing pages 355 and 359.

We ask the court to read the remainder of the quotation from page 359, represented in counsel's quotation by stars. This shows that even according to the testimony of J. A. Dowling, who tried to keep from paying the Sunset Construction Company and Rauer what was coming under the contract, testifies that Buckman was on the job every morning.

It also appears from the further testimony that Buckman was very instrumental in getting this contract and the money for it. (Transcript page 362.)

With reference to the expense of repairing the equipment, counsel is just as unfair as they are all through the rest of their brief. They cite, page 41, the testimony of Rauer to this effect, "I could not estimate what I paid out for repairing the sand machines", as a statement indicating that Rauer did not pay it out, or knew nothing about what he had actually paid out. We submit that the proper

interpretation of that statement is that the amount was so large it was hard for him to estimate; but Rauer is more specific in his testimony, and states amounts actually paid by him for that. (Transcript pages 365, 369, 370.) It is true the Master excluded Rauer's account showing payments of $2025.96 for these expenses, which account sets forth fully the items of each expenditure, upon the ground that Rauer did not accompany the account by receipted bills from the parties to whom he had actually paid the money. (See pages 185-190 Transcript.)

It will be noted that the bill of the Pacific Gas & Electric Company which counsel comments upon on pages 40-41 is not among those, and we ask the court to read the testimony as to this last bill (Transcript page 369), and it will clearly show counsel's comment is unwarranted.

On page 370 of the Transcript, Rauer testifies to the amounts paid out by him for the rent of the sand machine patent. Counsel say there is no such testimony.

Page 44, counsel take up the $300.00 Academy of Science collection and quote an isolated extract of testimony. Page 309 of the Transcript shows how misleading their quotation is. On the latter page it appears that the cost of finishing up this work (and which was after Buckman's bankruptcy) was $500.00, and for that was received only $300.00.

Rauer paid for this work, and all he got was the $300.00.

Page 45, counsel say that the correction (which we call attention to in our brief) of "January" to "June", is not correct. The Master in his report, page 75 of Transcript, agrees with us and quotes this time as being June.

Page 45 of the brief, counsel comment on the name of "Reeder & Foster", as follows: "The Master says that Reeder & Foster is probably another name for "Foster, Vogt Co.", and counsel add, "used by Rauer to confuse his account." Such a comment is unwarranted and vicious.

Nowhere in Rauer's testimony is there any attempt to confuse any account.

It will also be noted that counsel confess (their brief p. 45) that this contract was assigned to Rauer before bankruptcy, and therefore any collections which might have been made by him should not, even under counsel's and the Master's theory, be accounted for to the trustee.

The consideration of these various items, of course, is to our mind entirely academic, for the main underlying and controlling principles entitle Rauer to offset any collections which he might have made in his dealings with the Sunset Construction Company against any moneys that were owing to him, and even the Master has found that the Sunset Construction Company owed Rauer $18,746.22 on February 19, 1915, the date of Buckman's bank-

ruptcy (Transcript p. 77); and the testimony of Rauer and others, is to the effect that in the dealings subsequent to that date, the Sunset Construction Company became indebted to Rauer in an additional $18,000. (Transcript p. 368.) It seems to us that every justice and equity is with Rauer.

The record shows that Rauer as the mortgagee of all the machinery had taken possession under the terms of his mortgage and that under a decree of foreclosure in an action in which the Sunset Construction Company, the mortgagor, was defendant the property was sold and he had purchased the property himself. After this decree of foreclosure the trustee in bankruptcy took possession of this machinery proceeding upon the idea that the Sunset Construction Company was not the owner of the property, and that the trustee in bankruptcy should have been made a party to the foreclosure suit. Rauer, thereupon filed a petition in the bankruptcy court, asking the property be sold through the bankruptcy court, and that the proceeds of this sale be impounded to abide the determination as to who was entitled to the money. Rauer desired to obtain title, and the money derived from the sale he had a right to have applied on his mortgage, whether Buckman was the mortgagor or whether the Sunset Construction Company was the mortgagor,—because as mortgagee he was entitled to have the mortgaged property sold and the proceeds applied; and the property was sold as the trustee in bankruptcy wanted it sold, and the proceeds of the sale are im-

pounded awaiting the determination of this litigation. (See Item 3 of the Final Decree, Transcript page 206.) Surely this was a more sensible way of proceeding than to have litigation to determine whether the sale under the judgment of foreclosure against the Sunset Construction Company alone passed title. We do not see how it can be construed as anything excepting a disposition to pursue an unobjectionable course to get results.

The property was sold for $3701.60, and this is the property for the use of which the Master charges Rauer with $9006.99 and refused to allow the amount to be credited on the mortgage, but decrees that Rauer must pay the full amount to the trustees, although the amount for which the property was mortgaged will not be discharged by applying the purchase price and the rental value against the indebtedness.

On page 60 of appellee's brief it seems to be conceded that if the mortgagee has lawful possession of the mortgage he may apply the rents against the mortgage debt, but it is alleged that Rauer's possession of the mortgaged property was unlawful, and therefore he should not be allowed to apply the rental values against the mortgage indebtedness. The Master finds (Transcript page 44):

> "The mortgage was given in June, 1914, to secure a note for $5000.00 and future advances. * * * It contained a clause allowing the mortgagee to take possession after default. The notes were payable on demand, and since there was a continuing balance of indebtedness, it is

> probable a default occurred at an early date. * * * Since the mortgage provided the mortgagee might take possession, Rauer was entitled to do so at any time after default." (Page 46, Transcript.)

Even if it be assumed that the Sunset Construction Company was simply Buckman in another form, the trustee in bankruptcy would have no greater rights than Buckman, and the mortgagee would be entitled to possession. Rauer's possession as a mortgagee therefor was not unlawful.

In Jones on Mortgages, Sec. 715, it is said:

> "It is not essential to the status of a mortgagee in possession that possession should have been taken under the mortgage, nor with the consent of the mortgagor. It is enough that the possession be peaceable and legally acquired." (Citing cases.)

There is no question that Rauer's possession of the machinery was peaceably and legally acquired. It will be assumed that the possession of a mortgagee is lawful, and further it may be urged that since Rauer by the terms of the mortgage was entitled to possession, if any further consent were required, equity would consider that is done which ought to be done.

This subject is most fully covered in pages 58 et seq. of the opening brief for appellant.

In conclusion we make the following suggestions:

First: The issues presented by the pleadings are directed to the question of fraud in the transfer by

Buckman to Rauer of shares of stock in the Sunset Construction Company, and no issue is raised by the pleadings as to whether Rauer was a party conspiring with Buckman in the formation of the Sunset Construction Company to defraud Buckman's creditors.

Second: That the Master erred in not allowing Rauer credit in his account for the items specially pointed out in appellant's briefs, and particularly in not allowing Rauer to charge against his mortgage indebtedness the value of the use of the mortgaged property.

Third: The judgment is based on the report of the Referee whose demand for $5000.00 compensation for services could only be paid out of a fund created by a judgment in favor of the trustee in bankruptcy against the defendant Rauer.

And, lastly, Rauer can be held liable only upon the theory that he was a party to a fraud with Buckman in the creation of the Sunset Construction Company, a corporation, or in the carrying on of business of said corporation for the purpose of defrauding Buckman's creditors.

No reason can be suggested why Rauer should engage in such a conspiracy. No evidence is offered showing or tending to show that Rauer even had an acquaintance with Buckman at the time of the formation of the Sunset Construction Company, much less that he knew the Sunset Construction Company was formed for the alleged purpose of defrauding

Buckman's creditors, and the Master finds that Rauer in good faith believed he had the right to transact business with the Sunset Construction Company, and the judgment of the court in favor of Buckman, dismissing him from the action and allowing his costs of suit is absolutely irreconcilable with the idea that Rauer was a party to any conspiracy with Buckman to defraud Buckman's creditors.

Fraud is never presumed. The Master reports a judgment against Rauer—feels constrained so to do because of his interpretation of the so-called interlocutory decree, and this interlocutory decree, as we have shown, has no basis in the pleadings for a judgment that Rauer was a party with Buckman in the scheme of defrauding Buckman's creditors; and further the evidence before the court, and upon which the decree was based lends not the slightest support to any judgment decreeing that Rauer was a party to a conspiracy in the formation of the Sunset Construction Company to defraud Buckman's creditors.

The record shows there is owing to Rauer because of his dealings with the Sunset Construction Company an unpaid balance of $37,307.76. If to that sum be added the amount of the present judgment, there will be a sum of over $50,000.00 of a loss suffered by Rauer.

Let it be borne in mind that basicly the plaintiff as trustee for the creditors is entitled to recover

only upon the theory that Rauer through a consummated fraudulent conspiracy has deprived such creditors of a sum of money represented by the amount of the judgment in this case. How can a judgment upon such a theory be sustained when the record shows that Rauer instead of wrongly and fraudulently depleting any assets to which Buckman could in any way lay claim, has added to those assets in the sum of $37,307.76?

To our mind the judgment in this case is very wrong, and we submit it should be set aside.

Dated, San Francisco,
November 26, 1923.

H. M. Anthony,
J. B. Zimdars,
Wm. Grant,
*Attorneys for Appellant.*